INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Corcio v. *United States*, 354 U.S. 118	7
Foster v. *United States*, 265 F. 2d 183, certiorari denied, 360 U.S. 912	6
Lash v. *Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904	6
Martin v. *Cleandix Securities Co.*, 328 F. 2d 731	7
Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186	7
Peoples Deposit & Trust Co. v. *United States*, 212 F. 2d 86	6
Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	8
Zimmerman v. *Wilson*, 81 F. 2d 847	7
Zimmerman v. *Wilson*, 105 F. 2d 583	7
Constitution and Statutes:	
Constitution of the United States:	
Fourth Amendment	6, 7
Fifth Amendment	2, 7
Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):	
Sec. 275	9
Sec. 276	9

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

	Page
Sec. 6501	2, 9
Sec. 7402	2, 3, 9
Sec. 7602	2, 3, 10
Sec. 7604	2, 3, 11
Sec. 7605	2, 3, 6, 11

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 792

STEEL EQUIPMENT COMPANY AND BROADROCK DEVELOPMENT CORPORATION, PETITIONERS

v.

EDWIN A. EBERHART, SPECIAL AGENT OF THE INTELLIGENCE DIVISION OF THE INTERNAL REVENUE SERVICE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 30a–35a) [1] was delivered orally and is not officially reported. The opinion of the court of appeals (Pet. 30–31) is reported at 296 F. 2d 685.

JURISDICTION

The judgment of the court of appeals was entered December 14, 1961 (Pet. 32). The petition for a writ

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[1] Record references are to the appendix to the petitioners' brief in the court of appeals. "Supp. R." references are to the appendix to respondent's brief in the court of appeals.

of certiorari was filed on March 12, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. The district court found that there was reasonable ground for suspicion of fraud in the federal income tax returns of petitioners and their principal officer and stockholder and ordered enforcement of a summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954 calling for production of books and records for a period commencing prior to the three-year statute of limitations. The question presented is whether the district court's finding that there was reasonable ground for suspicion of fraud is supported by substantial evidence and is not clearly erroneous.

2. Whether the district court's orders enforcing summonses issued to petitioner corporations for the production of books and records pursuant to Section 7602 of the Internal Revenue Code of 1954 violate their rights under the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The pertinent portions of Sections 6501, 7402, 7602, 7604, and 7605 of the Internal Revenue Code of 1954 are set out in Appendix, *infra*, pp. 9–11.

STATEMENT

Commencing January 14, 1959, Revenue Agent Drummond and, later, Special Agent Eberhart engaged in an examination of the books and records of petitioner Steel Equipment Company at its offices

(R. 12a–13a). On March 24, 1959, Agent Eberhart delivered reopening letters, issued pursuant to Section 7605(b) of the Internal Revenue Code of 1954 (App., *infra*, p. 11), to Steel Equipment and its president and principal stockholder, F. Jules Keller (Supp. R. 2b–3b).[1] Early in May 1959, representatives of Steel Equipment refused the agents further access to the records, although no objection had been raised prior to that time (Pet. 7; R. 13a).

On May 11, 1959, the Commissioner of Internal Revenue issued a summons under the authority of Section 7602 of the Internal Revenue Code of 1954 (App., *infra*, pp. 10–11) requiring Steel Equipment to produce for examination certain designated records for the period 1950 through 1957 (Pet. 7; R. 35a). A similar summons was served upon petitioner Broadrock Development Corporation covering the years 1956 and 1957 only (Pet. 9; Supp. R. 4b).[2] Petitions to quash the summonses were filed in the district court and dismissed on motions for summary judgment by the government. The Sixth Circuit affirmed (283 F. 2d 870, 872; Pet. 7).

Thereafter, on December 12, 1960, the Commissioner served a new summons on each of the petitioners, requiring production of the same records for the same years: 1950–1957 for Steel Equipment; 1956–1957 for Broadrock. When petitioners failed to comply (R. 3a, 5a–6a, 9a–10a), respondent, pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue

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[1] Mr. Keller was also the principal officer and stockholder of petitioner Broadrock Development Corporation (Pet. 30).

[2] No previous examination had been made of Broadrock's books or records (Pet. 30; Supp. R. 2b; R. 39a).

Code of 1954 (App., *infra*, pp. 10–11), filed complaints for enforcement in the district court (R. 2a–3a, 7a). The district court, upon the complaints and supporting affidavits of Special Agent Eberhart, issued orders to show cause why petitioners should not comply (R. 4a–6a, 10a) and held a full oral hearing lasting several days at which witnesses for the government and for petitioners gave evidence (Pet. 30; R. 1a–2a, 7a, 11a–30a). At the conclusion of the hearing the district court orally announced its finding (R. 30a–35a) that the special agent had reason to suspect that there was fraud in petitioner Steel Equipment's handling of travel expenses and held that examination of its records for the years allegedly barred by the statute of limitations was warranted (Pet. 30–31).

The court in its opinion noted the following facts, *inter alia*, as grounds for suspicion: that of "$40,000 worth of expenses * * * they have been able to authenticate only $4,000, or 10%" (R. 33a); that, after petitioner's accountant had specifically requested that receipts and other authenticating papers be kept (R. 30a), each of petitioner's two top officers was "turning in expenses for around a thousand dollars a month," mostly without authentication (R. 31a–32a);[4] and that, contrary to his testimony under oath on a prior occa-

[4] As an example, the court noted that the expense account of one officer for May 1956 showed $1,127 expended over 15 days for "meals and miscellaneous," exclusive of lodgings, and that "the unauthenticated entertainment expenses of another ran $130 on the 11th, $149 on the 18th, $145 on the 23d and $226 on the 30th of one month (R. 31a).

sion, a witness for petitioner claimed that the lack of authentication was due in part to a burglary when sustaining vouchers—not money—had been stolen (R. 32a–33a).

With respect to Broadrock the court found that there had been no previous examination and hence no basis for a claim of repetitive review. Special Agent Eberhart had deposed that Broadrock had been organized for the purpose of buying and developing real estate and that he had reason to believe that F. Jules Keller, the principal stockholder and officer of both petitioners, had had transactions with Broadrock which resulted in taxable income to him which he had fraudulently omitted from his income tax returns for 1956 and 1957 (R. 10a). The district court found that the suspect handling of travel expenses by Steel Equipment warranted investigation of Broadrock which was under the same ownership and control (R. 33a–34a), and ordered production of the designated books and records (R. 35a).

The court of appeals affirmed, noting that "While the evidence with respect to the fraudulent travel expenses concerned the tax years 1956 and 1957, there was also some testimony as to lack of records to support the deductions claimed for travel expenses in previous years" (Pet. 31). The court of appeals held that the district court's finding "that there was at least an inference that fraud extended into some of the previous years" was binding as not clearly erroneous (*ibid.*).

ARGUMENT

1. Although petitioners advance several contentions,[5] all but one of their arguments rest on the claim that the district court's finding that there was reasonable cause for suspicion of fraud is not supported by substantial evidence. There is some disagreement among the circuits as to what, if any, justification must be shown by the government to obtain enforcement of a summons for documents relating to periods which, in absence of fraud, would be barred by the statute of limitations.[6] The instant case, however, is

[5] Petitioner Steel Equipment argues that the government has not proved that examination of the barred years 1950–1955 or a re-examination of its returns for 1950, 1953, 1954 and 1955 was "necessary" as required by Section 7605(b) of the Internal Revenue Code of 1954 (Pet. 11–20); and that in absence of such a showing the enforcement of the summons is a violation of its rights under the Fourth Amendment (Pet. 21–24). The latter claim was not advanced by either petitioner in the district court. No basis exists for a claim by Broadrock that the examination would be repetitive or barred by the statute of limitations. Its tax returns had never been examined before (R. 30a) and the summons addressed to it (R. 9a) covered only the years 1956 and 1957, which had not been barred by the statute of limitations at the time the first summons was issued to it on May 19, 1959 (Supp. R. 3b–4b), the enforceability of that summons having been in continuous litigation since that time.

[6] The First Circuit has adopted the most demanding test: the government must introduce facts sufficient to satisfy the court that there are reasonable grounds to believe that fraud exists. *Lash* v. *Yighosian*, 273 F. 2d 185 (C.A. 1), certiorari denied, 362 U.S. 904. At the opposite pole, the Second Circuit requires no showing of grounds for belief of fraud, but only that the proposed investigation is within the statutory authority of the Service and that the summoned documents are relevant and material to the inquiry. *Foster* v. *United States*, 265 F. 2d 183 (C.A. 2), certiorari denied, 360 U.S. 912. The Sixth Circuit has

not an appropriate vehicle for resolution of any such conflicts as may exist. Petitioners' complaint is not with the standard adopted by the district court—reasonable ground for suspicion or fraud—but only with the adequacy of the evidence to support the court's finding that this standard had been met. The facts in the record, as detailed by the district court in its opinion (see Statement, *supra*; R. 30a–35a), are clearly sufficient to support this finding and would be sufficient under the strictest standard adopted by any circuit court.

2. There is no merit to petitioner's remaining contention that the orders for enforcement of the summonses were barred by the Fifth Amendment to the Constitution (Pet. 24–28).[7] It is settled that a corporation is not protected by the constitutional privilege against self-incrimination and a corporate officer may

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taken a mid-position. Its test is satisfied when the agent attests to a bona fide suspicion of fraud. That court has expressly rejected any requirement that the district court review the underlying facts. *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (C.A. 6).

[7] The cases cited by petitioners, *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (C.A. 9) (Pet. 12–14), and *Zimmermann* v. *Wilson*, 81 F. 2d 847 (C.A. 3) (Pet. 17), upon which their claim of conflict with decisions of other courts of appeals (Pet. 10) is inferentially based, require no greater showing than was made in the court below. The scope of the decision in the cited *Zimmermann* case was sharply limited by the Third Circuit in a later case, *Zimmermann* v. *Wilson*, 105 F. 2d 583.

[8] There is no occasion for independent consideration of petitioners' contention that the summonses violate the Fourth Amendment (Pet. 21–24). It rests on the assertion, already disposed of, that respondent "has not shown any facts which would entitle him to look at the barred tax years, has not shown that his summons was not unnecessary, and was not unreasonable * * *" (Pet. 23).

not withhold documents on the ground that either he or his corporation would be incriminated. *Curcio* v. *United States*, 354 U.S. 118, 122; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 205. In addition, since, petitioners failed to raise this issue in the district court, it is not open here. *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1962.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 6501.[1] LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) *General rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time. [1]

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To issue orders, processes, and judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers,

[1] Sections 275(a) and 276(a), Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 275 and 276) contain substantially similar language.

and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and

to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

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SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * * * *

(b) *Restrictions on examination of taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

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